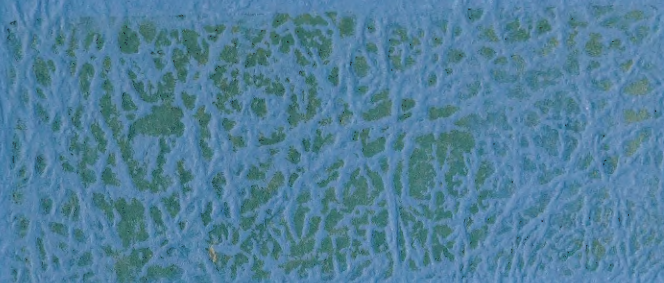


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# Ontario Human Rights Commission Discrimination Because of Handicap



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 **Ontario**  
Human Rights Commission

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*This document contains the Commission's interpretation of the Provisions of the Ontario Human Rights Code as they relate to discrimination because of handicap. It is subject to interpretation by boards of inquiry and the courts, and should be read in conjunction with the specific provisions of the Code. Any questions regarding this policy or the Code generally should be directed to the staff of the Ontario Human Rights Commission.*

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# DISCRIMINATION BECAUSE OF HANDICAP

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## INTRODUCTION

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The *Human Rights Code*, 1981 provides the right to freedom from discrimination because of disability or handicap<sup>1</sup>, in several important areas. Persons with disabilities cannot be discriminated against with respect to:

- services, goods and facilities;
- the occupancy of accommodation;
- contracts;
- employment; and
- membership in vocational associations and trade unions.

Abusive treatment or harassment because of disability is also prohibited. Such treatment includes name-calling and unwelcome jokes or remarks that can cause embarrassment or discomfort to a person with a disability.

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## WHO IS COVERED?

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The types of disability covered by the *Code* are:

- any degree of physical disability or disfigurement caused by injury, illness or birth defect (this includes diabetes, epilepsy, paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech

impediment and reliance on a dog guide, on a wheelchair or other remedial device);

- learning disability or any dysfunction in the ability to understand or use symbols or speech;
- intellectual impairment; and
- mental disorder.

The *Code* covers persons with both actual and perceived disabilities, as well as disabilities which occurred in the past. An example of a person with a perceived disability is one who has tested HIV positive but has no symptoms of AIDS.... A person with a past disability may be one who has recovered from cancer or surgery.

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## ACCESS AND AMENITIES

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A person with a disability may be unable to gain physical access to a workplace, housing unit or facility. However, a job, apartment or service cannot be denied because entrances to a building, or the work or living environment, are unsuitable for a disabled person.

Employers, landlords and service providers must provide access for disabled persons by way of special measures designed to remove barriers in the workplace, housing or service. This requirement is termed "accommodation" in the *Code*. Only when it can be proven that no appropriate accommodation exists or that providing the accommodation would create

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<sup>1</sup> Although the *Code* uses the term "handicap", this brochure uses the term "disability" which is preferred by many persons with disabilities.



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undue hardship can the disabled person be refused a job, housing or service.<sup>2</sup>

Many physical environments need to be modified or adapted to facilitate their use by persons who are disabled. Accommodation may be required by way of amenities that will enable persons with disabilities to do the job or occupy the apartment. For example, bathroom doors and hallways may need to be widened to accommodate persons who use wheelchairs.

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### *ABILITY TO PERFORM THE ESSENTIAL DUTIES*

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" Essential" duties refers to those duties which are necessary to the performance of the job or the use of the housing or services. For example, the ability to operate a photocopier may not be an essential duty for a receptionist, but it may be an essential duty for a clerical position involving a high volume of photocopying.

A job, apartment or service cannot be denied because the person cannot perform the essential duties unless efforts have been made to accommodate the needs of that person.

In the employment setting, many duties are non-essential in the sense that accommodation can be provided by assigning them to another employee. The disabled worker can often assume an equivalent part of the other worker's duties.

The nature and degree of disability and its duration may affect the person's ability to

perform the essential duties of the job, or to be a tenant or recipient of a service, unless accommodation is provided. The job may need to be redefined or restructured, or the workplace or apartment may require modification. For example, a desk may have to be adjusted to accommodate a typist who uses a wheelchair.

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### *CONSTRUCTIVE DISCRIMINATION*

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Constructive discrimination occurs where a requirement or a factor exists that is neutral on its face, but which results in the exclusion of a group that is named in the *Code*. For example, a requirement that an employee have a driver's licence would exclude applicants who are blind or have some other type of disability which prevents them from qualifying for a driver's licence.

If such a requirement operates to exclude person with a disability as a group, the needs of that group must be accommodated unless no appropriate accommodation exists or it would cause undue hardship to provide accommodation.

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### *EXCEPTIONS TO THE RIGHT TO FREEDOM FROM DISCRIMINATION*

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The *Code* permits certain exceptions to the right to equal treatment without discrimination because of disability in the following situations:

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<sup>2</sup> Please refer to the Commission's "Guidelines for Assessing Accommodation Requirements for Persons with Disabilities", and the accompanying brochure.



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### ***Services and Facilities***

Religious, philanthropic, educational, fraternal or social institutions or organizations that serve the special interests of persons with a particular disability may restrict membership or participation to persons who have that particular disability.

### ***Residential Accommodation***

Residential accommodation may be denied or restricted to person with disabilities (or any other groups covered in the *Code*) where the housing arrangement requires the occupants to share kitchen or bathroom facilities with the owner or his or her family.

### ***Insurance Contracts***

The following types of insurance contracts may exclude a person or provide for different treatment, such as different or preferential premiums or benefits, on the basis of disability, if the exclusion, difference or preference is made on genuine and reasonable grounds:

- automobile insurance;
- life insurance;
- accident, and sickness and disability insurance;
- group insurance between an insurer and an association or person other than an employer -- for example, a contract of group insurance with a professional association on behalf of its members; and
- a life annuity

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### ***EMPLOYMENT BY SPECIAL INTEREST ORGANIZATIONS***

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Religious, philanthropic, educational, fraternal or social organizations or institutions which serve the special interests of persons with disabilities may restrict employment, or give preference in employment to person that have a particular disability provided that this is done on genuine and reasonable grounds because of the nature of the employment.

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### ***PERSONAL ATTENDANTS***

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An individual may discriminate on the basis of disability (or any other characteristics covered in the *Code*) when employing someone to attend to his or her medical or personal needs or those of an ill, aged or infirm relative.

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### ***EMPLOYMENT BENEFITS***

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The *Code* permits genuine and reasonable distinctions or exclusions because of disability in the following types of employee benefit plans:

- an employee disability or life insurance plan or benefit if the reason is a pre-existing disability that substantially increases the risk;
- an employee-pay-all or participant-pay-all benefit in an employee benefit, pension or superannuation plan or contract of group insurance between an insurer and an employer, or;



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- an employee group plan which has fewer than 25 participants.

However, when an employee is excluded because of a disability from an employee benefit, pension or superannuation plan or fund, or a contract of group insurance between an insurer and the employer, the employer must pay compensation to that employee which is equivalent to the amount contributed to the insurer on behalf of a non-disabled employee. Employment may not be denied or made conditional upon enrolment in such a plan.

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### *SPECIAL PROGRAMS*

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A special program or affirmative action program designed to assist persons with disabilities is not considered discriminatory if it meets the requirements of the *Code*. Many employers, educational institutions and others believe they have a responsibility to take such special steps to remove barriers to equal treatment and to increase opportunities for person with disabilities.

The Commission has a mandate to facilitate and encourage the implementation of special programs. However, anyone who considers that his or her rights have been infringed by a particular program may complain to the Commission, and the Commission will investigate the complaint.

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### *EMPLOYMENT AGENCIES*

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Employment agencies may not discriminate on the basis of disability, even if asked to do so by the employer.

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### *EMPLOYMENT ADVERTISEMENTS*

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It is illegal for an employer to advertise in a way that directly or indirectly indicates an unwillingness to hire a person with a disability. It is also illegal for a publication such as a newspaper to print such an advertisement.

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### *APPLICATIONS*

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Job application forms may not require information about a person's physical or mental condition. This is to avoid a person being screened out for consideration for a job because of an assumption that he or she cannot perform the job.

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### *INTERVIEWS*

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The interview is the appropriate time to ascertain whether a person can perform the essential duties of the job. Therefore, it is advisable for employers to identify the essential duties of the job and to ask questions at the employment interview to determine whether the applicant is able to perform them. Questions about disabilities are permissible in an interview, as long as the questions are related to whether the person can perform the essential duties. The interview is also the



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appropriate time to discuss any special needs the applicant may have to enable him or her to perform the essential duties of the job.

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### *MEDICAL INFORMATION*

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Inquiries of medical professionals and medical examinations should only be conducted after an offer of employment has been made, preferably in writing. The offer may be conditional on the applicant's ability to perform the essential duties of the job as determined by a job-related medical examination. Any medical inquiries must be directly related to determining the person's abilities to perform the essential duties of the job.

As mentioned earlier, if the applicant or employee requires accommodation to enable him or her to perform the essential duties, the employer must provide such accommodation unless it would cause undue hardship to do so.<sup>3</sup>

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### *THE RIGHT TO FILE A COMPLAINT*

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Any person who believes that he or she has been discriminated against may file a complaint with the Ontario Human Rights Commission. The Commission may also initiate a complaint by itself or at the request of any person.

It is contrary to the *Code* for anyone to threaten a reprisal or take any action against a person who complains to the Commission or assists with a complaint. For example, an employer who threatens to fire a worker for

giving evidence with regard to an alleged violation of the *Code* is breaking the law.

Each complaint is registered and assigned to a Human Rights Officer. A copy of the complaint is then delivered to the person(s) against whom the complaint is made.

A Human Rights Officer will investigate the complaint and attempt to settle it. A settlement may include back pay, return of a lost job or seniority, transfer, or compensation for mental anguish. It may also result in the change of a discriminatory policy or practice, or the implementation of a special program to assist persons with disabilities.

Complaints that cannot be settled may be referred by the Commissioners to an independent Board of Inquiry if they believe the procedure is appropriate and the evidence warrants an inquiry. If the board finds that there has been a contravention of the *Code*, it may make any order it views appropriate to ensure compliance with the *Code*, both in the complainant's case and with regard to future practices. The board can order financial compensation for loss to the complainant and may order up to \$10,000 to be paid to the complainant for mental anguish.

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<sup>3</sup> For more information please refer to the Commission's "Policy on Employment-Related Medical Information".





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